IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 21ST JUNE 2007 / 31ST JYAISHTA 1929

OP.No. 6280 of 2003(V)

PETITIONER:

K.M.JOY, UPSA, ST.JOHN'S H.S.S.
KAVALANGAD, KOTHAMANGALAM.

BY ADV. SRI.WILSON URMESE

RESPONDENTS:
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1. **THE DISTRICT EDUCATIONAL OFFICER,**
   KOTHAMANGALAM.

2. **THE PRINCIPAL, ST. JOHN'S HSS,**
   KAVALANGAD, KOTHAMANGALAM

3. **THE ACCOUNTANT GENERAL (AUDIT),KERALA.**

BY GOVERNMENT PLEADER SRI.K.G.BHASKAR

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 21/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.11080 OF 2003 IN O.P.NO.6280 OF 2003

DISMISSED.

21.06.2007 Sd/- THOTTATHIL B.RADHAKRISHNAN,JUDGE

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE STATEMENT OF FIXATION OF PAY ISSUED BY THE IST RESPONDENT.

EXT.P2: COPY OF ORDER NO.B5-2847/2001 DATED 18.7.2001.

EXT.P3: COPY OF THE STATEMENT OF REGULARIZATION OF PAY ISSUED BY THE RESPONDENTS.

EXT.P4: COPY OF THE ORDER NO.B2-6275/2001 DATED 7.11.2002 OF THE 1ST RESPONDENT.

EXT.P5: COPY OF G.O(MS) 134/86/G.Edn. DATED 7.8.1986 ISSUED BY THE GENERAL EDUCATION DEPARTMENT.

EXT.P6: COPY OF G.O.(P).No.347/2000/G.Edn. DATED 19.10.2000 ISSUED BY THE GENERAL EDUCATION DEPARTMENT.

TRUE COPY

P.A.TO JUDGE

THOTTATHIL B. RADHAKRISHNAN, J.

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O.P.No.6280 of 2003-V

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Dated this the 21st day of June, 2007.

JUDGMENT

Petitioner, appointed as an HSA, on 5-8-1985, in a leave vacancy, was appointed as such, in a regular vacancy on 1-6-1987. He worked so till the abolition of that post on 14-7-1992. On the next day, 15-7-1992, he was appointed as UPSA in the same school. He was granted a higher grade as UPSA on 27-3-1997 reckoning his earlier service as HSA also, in counting the total length of service for determining his entitlement for such higher grade. This was objected to in the Audit, leading to the impugned action whereby, the differential on account of the grant of the higher grade, from 27-3-1997 to 30-4-2001, is ordered to be recovered from the petitioner's salary.

2. The learned counsel for the petitioner argued that going by Ext.P6, the three Government Orders relied on against the petitioner in Ext.P2, are not in force. It is further argued

that by virtue of the decision of the Division Bench in **Secretary to Government v. Mary [2004 (2) KLT 1090]** explaining the earlier decision of the Full Bench in **Krishna Panicker v. State of Kerala [1993 (2) KLT 1058]**, the tagging along of the service as a Primary Teacher or an UPSA for the purpose of higher grade as an HSA cannot be treated as always impermissible and therefore, as a corollary, the prior service of the petitioner as an HSA before he entered service as UPSA can also be tagged along to determine the total length of service to grant him higher grade as a UPSA.

3. It was also argued that at any rate, the excess payments to the petitioner on account of an erroneous pay fixation are not the results of any action attributable to him and therefore, the impugned recovery cannot be sustained.

4. The existence or otherwise of the three Government Orders referred to in Ext.P2 is of no impact on the case in hand. All that is stated in Ext.P2 on the basis of those Government Orders, is that the petitioner was not entitled to any preference or claim to the post of UPSA, by reason of his earlier service as

an HSA. The existence or otherwise of those Government Orders is irrelevant because, it is beyond dispute that the prior service of the petitioner as an HSA had no legal effect giving him any preference to enter service as a UPSA.

5. The cited judgments (supra) apply only to cases of movement of teachers from the lower to the higher sections, like Lower Primary to Upper Primary, or to High School. It is the upward progression in a hierarchy that fell for consideration in those cases. The case in hand is not one such.

6. The basis of granting a higher grade on completion of a particular length of service is to extend certain monetary benefits to an employee stagnating in a particular post. This concept of granting a higher grade, as a consolation for career advancement that remains unavailable, is meant only for those stagnating in a particular category. In certain cases, the Government, by executive action, decided to count the total length of the service rendered by a servant in the lower categories also, to grant a higher grade. This is why the length of service as UPSA is reckoned for the purpose of fixing the

higher grade as an HSA. The category of HSA is not a feeder category for appointment by promotion as UPSA. Had the petitioner continued as HSA following his substantive appointment on 1-6-1987, could he have aspired to be promoted as a UPSA? Obviously, not. The abolition of the post of HSA held by him till 14-7-1992 would not entitle him to enter the category of UPSA, only on that ground or on the basis of any preference on that count. One, who is working as a UPSA, is therefore not entitled to tag along any prior service in a different category, which is not a category from which he can aspire for promotion as UPSA, for the purpose of reckoning the continuity of service for conferment of higher grade as a UPSA. The category of HSA is one that is higher to that of the UPSA in the hierarchy. Hence, the prior service in that higher category cannot be tagged along with the service rendered later in a lower category for the purpose of granting a higher grade. A view to the contrary would run against the very concept of stagnation based grant of higher grades. Therefore, the prior service of the petitioner as HSA cannot be counted to determine the length of service for grant of higher grade as a UPSA.

7. For the aforesaid reasons, the Audit objection contained in Ext.P2 is in order.

8. Now, the question that remains for decision is as to whether the scales of justice tilt in favour of the petitioner for an order inhibiting recovery. No circumstance which could persuade the writ Court to treat the petitioner's case as an exceptional one is pleaded. While it is true that the grant of higher grade was not made on the request of the petitioner, it was the result of an error of the administration in the matter of applying the relevant Government Orders. Therefore, following the judgment of the Division Bench of this Court in **Santhakumari v. State of Kerala [2005 (4) KLT 649]**, the recovery is unassailable. Not only that, the impugned Ext.P4 request for recovery of Rs.34,311/- issued on 7-11-2002 remains stayed on account of the interim order passed on 24-2-2003 on C.M.P.11080/2003. The result is that by now, the petitioner had enjoyed custody of such amount without any liability to pay interest. Therefore, I do not find any injustice in the impugned recovery being enforced. However, at the request of the learned counsel for the petitioner and having regard to the amount

involved, it is directed that the respondents shall not recover the entire amount in a lump.

Subject to the limited directions issued above, this writ petition stands dismissed.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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THOTTATHIL B. RADHAKRISHNAN, J.

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JUDGMENT

Dated: 21st June, 2007.